



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CIVIL JURISDICTION

CIVIL CASE NO. 30 OF 2022

BETWEEN

JACILLA TOM

Plaintiff

AND

ANNIE MALUPO

Defendant

Before:

Khan, ACJ

Date Hearing:

3 February 2023

Date of Ruling:

6 February 2023

Case to be referred as: *Tom v Malupo*

CATCHWORDS: Interlocutory Injunction – Where the plaintiff obtained ex parte interim injunction orders against the defendant for trespass – Whether the plaintiff failed to make disclosure that the defendant was a landowner – Whether landowners can trespass on land on their own land – Whether landowners can trespass on land for which consent to build dwelling house has been granted by 75% of the landowners.

APPEARANCES:

Counsel for the plaintiff:

V Clodumar

Counsels for the defendant:

L Aingimea

RULING

INTRODUCTION

1. The plaintiff is one of the landowners of land portion 121 Aeonun (portion 121) in Baitisi District. On 4 September 2022 the plaintiff made an application to the Director of Land and Survey to obtain consent of the landowners to build a house on portion 121.
2. She obtained 79% per share and 78% per head of the consent of the landowners and the consent form was certified by the Acting Secretary for Land Management on 10 October 2022.
3. The defendant is in the process of constructing her dwelling house on land portion 123 Baitisi District (portion 123).
4. The boundaries of portion 121 and 123 are adjoined to each other.

EX PARTE APPLICATION FOR INTERIM INJUNCTION

5. The plaintiff filed an ex parte application for interim injunction on 15 December 2022. In her statement of claim she pleaded at [7] and [8] as follows:

[7] The defendant is encroaching onto land portion 121 from the adjoining land portion 123, both in Baitisi District, where she is constructing her house.

[8] The defendant has trespassed or caused to trespass on land portion 121.

6. In her affidavit filed in support of the ex-parte application filed on 15 December 2022, she deposed at [4], [8], [9], [11], [12] and [13] as follows:

[4] That I intend to build a house on portion 121, Baitisi District (hereinafter referred to as "the land").

[7] That on the same day Mrs Sieda Mwareow inform me that she sold her share to the said Annie Malupo (the defendant in this matter).

[8] Mrs Sieda Mwareow further indicated to me that she transferred her share in the portion in consideration for financial support. Mrs Sieda Mwareow also stated that certain conditions were discussed with defendant on the use of the land.

[9] *That according to Mrs Sieda Mwareow the said defendant indicated to her that she will be only constructing on part of the land equal to the share she acquired from her.*

[11] *That the defendant has cleared her land into my land indicating that she will be utilizing the whole of portion 123 and part of Portion 121 in Baiti taking the share of Seida Mwareow. Refer to Annexure C for the map of the land.*

[12] *The defendant has engaged light machinery and installed containers along with other building material along my land.*

[13] *The defendant is clearly trespassing on the said land.*

7. On 15 December 2022 having heard the plaintiff's application ex parte, an order was made against the defendant restraining her and her servants and agents from constructing any building or dwelling house on portion 121 until further order of the court. The order was to remain in force until 18 January 2023 and it was adjourned to that date.

8. On 18 January 2023 the defendant was represented by Mr Aingimea. He had filed statement of defence and counterclaim on 23 December 2022 and in the statement of defence it is stated that:

1) *The defendant is the landowner of Portion 121;*

2) *The defendant became landowner on 18 May 2022 when the transfer from Sieda Mwareow was approved by the Cabinet;*

3) *The transfer was published in Gazette No. 577/2022;*

4) *The defendant is not a trespasser on portion 121.*

9. In the defendant's affidavit filed on 23 December 2022, she deposed as follows at [10], [11], [12] and [13]:

[10] *I am constructing a dwelling house on C/L portion 123.*

[11] *I am using C/L Portion 121 as:*

a) *a workspace area,*

b) *to store or park various construction equipments, and*

c) *As an access passage to C/L 123.*

[12] *I started construction work on C/L portion 123 around May 2022, after I became one of the landowners of portion 121.*

[13] *At no time during the months of May to November did the plaintiff approach me and inform me that she wanted to construct a house on C/L portion 121.*

10. The plaintiff filed an affidavit in reply on 20 January 2023 in which she deposed:

- 1) *That she had met the threshold of 75% when she obtained the consent of the landowners of Portion 121;*
- 2) *Sieda Mwareow signed the consent form on 8 October 2022; and she acknowledged that Sieda Mwareow had transferred her share to the defendant and claimed that the transfer infringed s.3(4) of the Lands Act 1976 and was null and void.*
- 3) *That if Sieda Mwareow's share is removed from the consent form, even then she has 77% of the landowner's consent.*
- 4) *She acknowledged that the defendant's foundation is within the boundary of portion 123; but the building materials, water tank, plant and equipment is in portion 121; that more building material has been placed on portion 121 after the interim injunction orders were made on 15 December 2022.*
- 5) *She has agreed to the defendant using 7/300 share transferred to her but the defendant is placing material beyond that share.*

HEARING OF INTERLOCUTORY APPLICATION

11. Mr Clodumar wants interim injunction orders issued on 15 December 2022 to continue as the defendant continues to trespass on portion 121. The defendant does not oppose to the plaintiff building her house on portion 121.
12. Mr Aingimea submitted that the interim injunction orders should be dissolved as the defendant is a landowner of portion 121; and therefore, the claim of trespass is baseless. He further submitted that the plaintiff obtained the ex parte injunction by non-disclosure of material facts in that the defendant was not a landowner which was material fact to the court granting the ex parte orders.
13. In support his case for non-disclosure, Mr Aingimea relied on the following case authorities:

- 1) *The Andria*¹ where Robert Goff LJ stated at pages 1135-1136 as follows:

“... it is axiomatic that in ex parte proceedings that there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made on an ex parte application, even though the facts were such that, with full disclosure, an order would have been justified... In our judgement, exactly the same applies in the case of an ex parte application for the arrest of a ship, where, as here, there has not been full disclosure of the material facts to the court.”

- 2) *Ghafoor and Others v Cliff and Others*² David Richards JJ stated at page 1091 as follows:

*“[46] Secondly, the claimants submit that Mr Cliff’s affidavit in support of the application contained serious misrepresentation and failed to make full and frank disclosure of relevant facts. These are serious criticisms in any case, but the importance of accurate evidence is particularly acute on an application without notice, and the duty of disclosure on such an application has been stressed by the Court on many occasions (see, for example, *Fitzgerald v Williams*, *O’Regan v Williams* [1996] 2 ALL ER 171 at 177, [1996] QB 657 at 667-668 per Bingham MR). The principles are well established and well known on applications without notice for injunctions and other interim relief, but they are fundamental to the proper functioning of the court’s process on any application without notice. It is of course the very fact that the application is made without notice to other interested parties which makes these principles so important. Other parties do not have the opportunity to correct or supplement the evidence which has been put before the court.”*

14. Mr Clodumar in response to the issue of non-disclosure stated that the plaintiff was not aware of the Gazette publication in May of 2022 and as it was not widely circulated; he further submitted that even the Department of Land and Survey which is based in the same building as the Nauru Lands Committee which processed the transfer was not aware of the Gazette Notice when it prepared the consent form on 14 September 2022 and put Mrs Sieda Mwareow as a landowner.

15. On the issue of the defendant being a landowner on portion 121 Mr Clodumar submitted that the defendant does not have the majority consent of the landowners to

¹ [1984] 1 ALL ER page 1126 Court of Appeal Civil Division

² [2006] 2 ALL ER page 1079 Chancery Division

use portion 121 and that she had placed building materials, water tank, plant and machinery on portion 121.

CONSIDERATION

NON-DISCLOSURE

16. I will address the issue of non-disclosure as that goes to the heart of the ex parte interlocutory application. In the case of *Andria* it is stated that “... *there should be full and frank disclosure to the Court of facts known to the applicant*”. The plaintiff in her affidavit filed on 15 December 2022 stated at [7] that Mrs Sieda Mwarieow informed her that she sold her share to Annie Malupo and in an affidavit filed on 18 January 2023 she acknowledged the transfer from Mrs Sieda Mwareow to the defendant.

17. In Civil Litigation³ stated at pages 287 and 288 as follows:

“...The usual penalty for material non-disclosure, whether inadvertent or not, is the discharge of the ex parte order (or, if it is limited to last only until the inter parte application) a dismissal of that application together with a refusal to reimpose it immediately (see generally Ali and Fahd Shobokshi Group Ltd v Moneim [1989] 1WLR 701 and the cases cited therein, and as to orders limited to last only until the inter partes application, see Dormeuil Freres SA v Nicolian International (Textiles) Limited [1988] 1WR 1362). However, the court has a discretion to maintain the injunction (or to make a new order, if the ex parte order has expired) if satisfied that no injustice has been caused to the respondent (see Brinks Mat Limited v Elcombe [1988] 1WLR 1350 and Lock International plc v Beswick [1989] 1 WLR 1268).

18. I am satisfied that the plaintiff disclosed all the facts known to her and I am further satisfied that no injustice is caused to the defendant.

WHETHER LANDOWNERS CAN TRESPASS ON THEIR OWN LAND?

19. I totally agree with Mr Aingimea that it is trite law that a landowner cannot trespass on his own land or land owned by a landowner in conjunction with other landowners, as is common in Nauru. They are referred to as tenants in common.

20. Obviously, this proposition only remains true for as long as the land remains undivided but the position changes when landowners by agreement decide to the use the land. This was reflected in the case of *Audoa v Finch*⁴ where Millhouse CJ stated as follows:

³ By John O’Hare and Robert Hill 7th Edition

⁴ [2008] NRSC 3 Civil Action No. 3 of 2005 (12 March 2008)

“This is an unhappy dispute between two branches of the same family. Members of both branches have undivided shares, it may be in varying proportions, in coconut land Ianepe, Portion 107, Aiwo District.

To determine the point at issue all that matters is that each of Douglas Audoa and Mason Dick have some share, some interest in Portion 107.

The point of issue is whether before demolishing a building which Mason Dick had been using, he said for twenty years, Mrs. E. E. Dick, another of the owners, but from the other family, should have at least consulted the other owners. It is conceded that she (and her family) did not. Her son-in-law, the defendant Paul Finch, at her request demolished the building despite vigorous protests by the plaintiffs. And I may add an order made earlier in these proceedings by the Resident Magistrate...

The question I have to answer is whether Mrs. E.E. Dick and her family members had in law an obligation to consult and agree with other land owners before demolishing the building and (apparently) appropriating more than half the Portion to their own use.

*No doubt they have acted high handedly in not consulting. They had, I suggest, at least a moral obligation to consult. Courtesy, good manners, sensitivity for the feelings of others demanded it. I have come to that conclusion despite Mr. Nimes' submission that it's not the Nauruan way. I reject Mr. Nimes submission. From my observation of Nauruan people, they as much as any other community practice the courtesies common to all civilized people. **Indeed their institutions (for example Nauruan Lands Committee) assume that disputes should be settled by discussion, conciliation, agreement and good will.** The defendant has acted quite to the contrary. (Emphasis added)*

Is that moral obligation also a legal duty? Counsel have not been able to cite any authority. I myself have found none.

The whole ethos of Nauru is toward consideration for the feelings and rights of others. The institutions of the country are based on that ethos. It is more than moral obligation. It should be and is a legal obligation as well.

*One may look at in another way. Paul Finch, on behalf of his family, demolished the building which belonged as well to his family as to other people. He interfered with property belonging partly to others. **A trespass to property. He acted unlawfully.**” (Emphasis added)*

PLAINTIFF'S USE OF PORTION 121

21. The defendant, as I stated earlier, is not opposed to the plaintiff using portion 121 to build her dwelling house since she has obtained the consent of the landowners.
22. The plaintiff had also obtained the consent of Mrs Sieda Mwareow the previous owner who transferred her share to the defendant but is quite happy to discard that portion and she maintains that she still has met the threshold of 75% of the landowners. She states that it is 77%.

WHAT IS THE CONSEQUENCES OF OBTAINING CONSENT OF LANDOWNERS

23. In *Capelle and Partners v Tom and Others*⁵ I stated at [27] as follows:

[27] *As can be seen from the cases discussed above that 75% or more of the landowners need to give their approval/consent to constitute the majority and once 75% give their consent/approval then it has the effect of binding the remaining 25%. This has been the practice in this country and that practice has to be followed to provide certainty and continuity, unless of course that practice is changed by legislature.*

24. The defendant became owner of portion 121 in May 2022 and the plaintiff's consent to build her house was certified by the Acting Secretary of Land Management on 10 October 2022; the defendant has not given her consent to the plaintiff, but yet she is still bound by the majority consent, as she falls within the category of the landowners who did not sign the consent form.
25. What this means is that the plaintiff is entitled to the exclusive use of portion 121, and if any person' including landowners which includes the defendant, were to enter Portion 121 without her consent they would be trespassing on her land.
26. I must confess that I have gone beyond the scope of the interlocutory injunction application but I was invited by both parties to address all the legal issues which I have done.
27. I note that the plaintiff was happy to accommodate the defendant in the use of the share that she acquired in portion 121 but unfortunately settlement talks did not eventuate. I also impressed upon both parties on more than one occasion during the hearing of this application to try and reach some compromise but they refused to do so.

⁵ [2019] NRSC 17; Civil Suit 43 of 2016 (17 June 2019)

28. Millhouse CJ's sentiments in Audoa's case is still relevant to Nauru today where he stated:

"Disputes should be settled by discussion, conciliation, agreement and good will" ... "The whole ethos of Nauru is towards consideration for the feeling and rights of others."

29. Now that the parties' rights have been clarified, I would recommend that they should make sincere efforts to reach a compromise.
30. Like Millhouse CJ, I also very strongly believe that land matters should be settled by way of mediation, and in the circumstances I allow the parties to have further discussions. I will adjourn the matter to 1 March 2023, and in the meantime I grant the defendant liberty to continue to use land portion 121 for the purposes of storing her building materials and equipment for the construction of her house on portion 123.

COMPULSORY MEDIATION FOR LAND MATTERS

31. I am of the view that prior to the hearing of all land matters the parties should be required to attend compulsory mediation as this will bring more peace and harmony amongst the people of Nauru. I am minded to issue a Practice Direction in that regard.

DATED this 6th day of February 2023.


Mohammed Shafiullah Khan
Acting Chief Justice.

